

SERVED : November 17, 1994

NTSB Order No. EA-4275

**UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.**

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 10th day of November, 1994

DAVID R. HINSON,
Administrator,
Federal Aviation Administration,)

Complainant,)

v.)

DANIEL C. WELLS,)

Respondent.)

Docket SE-10901

ORDER DENYING RECONSIDERATION

Respondent has filed a petition requesting rehearing, reargument, reconsideration, and modification of Board Order No. EA-4136, served on April 13, 1994.¹ In that order, we affirmed the suspension of respondent's commercial pilot certificate for 120 days on an allegation of a violation of section 91.9 of the Federal Aviation Regulations, 14 C.F.R. § 91.9 (now section 91.13(a)). We deny the petition.

This matter was heard by Chief Administrative Law Judge William E. Fowler, Jr., on October 17, 1991. Respondent was represented at the hearing and later, on appeal to the Board, by an attorney who was disbarred by the State of Maryland in 1993.² Respondent asserts in the instant petition that he was denied

¹The Administrator has filed a reply, urging the Board to deny the petition.

²The attorney consented to disbarment because of allegations that he had misappropriated funds from an estate.

effective assistance of counsel in the Board proceedings, citing the subsequent disbarment of the attorney in support of his claim. Respondent also attacks the sufficiency of the evidence and the appropriateness of the sanction.

The Administrator's order alleged that respondent took off from an airport which had been NOTAM-closed on the day in question until 4 p.m., because of nearby construction. The order also alleged that plastic X's weighted down by sandbags were on the runway when respondent took off. The Administrator presented the testimony of several percipient witnesses: a pilot who was waiting for the runway to be cleared so he could also take off; the construction foreman, who was waiting for one of his men to retrieve the X's on the runway; the assistant airport manager, who testified that he saw respondent's aircraft take off when there was a construction worker on the runway taking the X's off; the safety supervisor for the construction company, who testified that he saw the aircraft take off and that following the takeoff he observed X's on the runway; and the airport manager, who claims that she saw respondent take off before 4 o'clock.

Respondent testified that he took off after 4 o'clock, and that he believed that the runway had already been cleared.³ He contends that all of the Administrator's witnesses are lying. Respondent suggests that, but for the ineffectiveness of his attorney, he would have prevailed in this matter. Moreover, he argues, even if the outcome would not have been different, he is entitled to relief, because he was denied a fair hearing.

³Respondent argues that the finding of carelessness should not have been sustained because there was some evidence that he may have taken off after 4 p.m., rather than before 4 p.m. Respondent's contention fails to recognize that the law judge's decision did not require a finding that he took off before 4 p.m., because regardless of whether the NOTAM had expired, there was more than sufficient evidence that respondent's takeoff was careless under the circumstances. More than one disinterested witness testified that respondent took off when there were plastic X's weighted down with sandbags on the runway. Respondent's own witnesses testified that the area was "chaotic" during the construction period and that, in addition to checking the NOTAMs, they always checked the runway to insure that it was actually open before taking off. Finally, respondent conceded that he could not see the runway immediately in front of him when seated because his aircraft was a "tail-dragger." Thus, it would have been reasonable for the law judge to conclude that respondent took off without first insuring that the runway was clear, so as to support a finding of a violation of section 91.9.

The Board has traditionally given little weight to arguments of ineffective assistance of counsel. Administrator v. Jaax, 5 NTSB 1624, 1625 (1977); see also Administrator v. Jansen, 3 NTSB 2601 (1980). As we noted in Administrator v. Jones, 3 NTSB 3649, 3650 (1981), these are civil proceedings, and the right to counsel does not reach the same constitutional level as it would in a criminal case. Nonetheless, we have again reviewed the record, and we are not convinced that respondent's former counsel was ineffective so as to deny respondent due process. As we noted in our decision, respondent and his attorney were on notice from the incident report that the construction crew was in the vicinity of the runway, and it was reasonable for both of them to anticipate that other witnesses may have observed respondent's takeoff. Furthermore, respondent's attorney could have, and most likely did anticipate the nature of the witnesses testimony. He would have been hard-pressed to argue that he was not prepared to cross-examine them, under such circumstances. Indeed, one of the late-named witnesses had also been named as respondents witness. Thus, counsel would have lacked a persuasive argument for a continuance, and the fact that he did not request one does not, in our view, establish his ineffectiveness. In any event, counsel did file a motion in limine to preclude the testimony of the newly identified witnesses. When that motion failed, he proceeded with cross-examination that we think effectively established respondent's theory of the case. Counsel elicited convincing testimony that there was a great deal of animosity between respondent and the airport manager. The fact that this evidence failed to establish a motive for the construction crew to fabricate their testimony simply cannot be ascribed to a failure on counsel's part. Respondent was not denied a fair hearing.

As to counsel's performance on appeal, we reject the notion that an attorney is ineffective because he raises only those issues that he reasonably believes may have some merit, rather than taking the "shotgun" approach to appellate brief writing.⁴

ACCORDINGLY, IT IS ORDERED THAT:

The petition is denied.

HALL, Chairman, LAUBER, HAMMERSCHMIDT, and VOGT, Members of the Board, concurred in the above order.

⁴Respondent's attorney may have regarded an argument for a lesser sanction as frivolous, or at least detracting from the witness issue, in light of Board precedent that a respondent's violation history is relevant in the evaluation of the appropriateness of sanction. See, Administrator v. Priebe, NTSB Order No. EA-4286 at 8, n. 9 (1994), and cases cited therein.